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OFFICE OF THE
EXECUTIVE SECRETARY
June 11, 2002

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VIA HAND DELIVERY

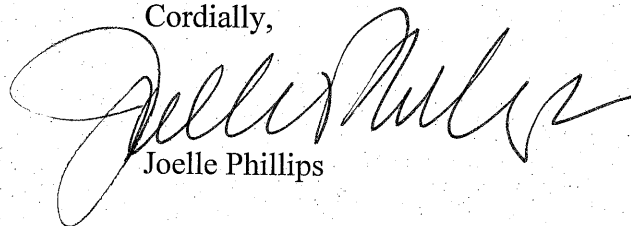
Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to
Declare Switching an Unrestricted Unbundled Network Element*
Docket No. 02-00207

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Motion to Compel Responses to Data Requests Or, in the Alternative, Motion to Dismiss. Copies of the enclosed are being provided to counsel of record.

Cordially,



Joelle Phillips

JP/jej

Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Switching an Unrestricted Unbundled Network Element*

Docket No. 02-00207

BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION TO COMPEL RESPONSES
TO DATA REQUESTS OR, IN THE ALTERNATIVE,
MOTION TO DISMISS

BellSouth Telecommunications, Inc. ("BellSouth") files this Motion to Compel responses to its data requests issued to the Petitioners in this docket. On June 5, 2002, each of the Petitioners in this docket filed objections to BellSouth's data requests.¹ Each of the Petitioners raised identical objections to BellSouth's discovery requests, and none of these objections has any merit. Accordingly, the TRA should either dismiss the Petition, require the Petitioners to respond to BellSouth's objections, or prohibit the Petitioners from presenting any evidence relating to any information sought by BellSouth's discovery requests.

General Responses to Petitioners' Objections

As to each of BellSouth's 12 data requests, Petitioners in this docket have rotely repeated that such requests are vague, overly broad, unduly burdensome, and not relevant. Petitioners provide no description of the manner in which such data requests are vague, and BellSouth respectfully submits that the questions are succinct, direct, and easy to understand. Moreover,

¹ As has been stated, the "UNE-P Coalition" is not a formal entity, but is rather the name by which Petitioners in this docket refer to themselves as a group. The Petitioners are Access Integrated Network, Inc., AT&T Communications of the South Central States, Birch Telecom of the South, Inc., Ernest Communications, Inc., MCIMetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc., New South Communications Corp., and Z-Tel Communications, Inc.

the Petitioners make no attempt whatsoever to explain why it would be unduly burdensome for them to provide the requested information regarding the relief they are seeking from the TRA in this proceeding.

With regard to relevance, each of the requests bears upon the availability, cost, or impact of local switching in Tennessee. To the extent that a State commission like the Authority is allowed to create a new UNE in the first place,² it is constrained by the same impairment standard the FCC must apply in determining whether a network element must be provided on an unbundled basis. 47 C.F.R. § 51.317(b)(4). The FCC, following the Supreme Court's remand of its initial interpretation of the impairment standard, revised its definition of "impair" so as to require unbundling if, "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, *lack of access* to that element *materially diminishes* a requesting carrier's ability to provide the services it seeks to offer." *UNE Remand Order*, ¶ 51 (emphasis added); 47 C.F.R. § 51.317(b)(1). In determining whether alternative elements are available, the Commission must consider cost, effect on timeliness of entry, quality, ubiquity, and impact on network operations. *UNE Remand Order*,³ ¶¶ 65, 71-100; 47 C.F.R. § 51.317(b)(2). BellSouth's discovery requests, therefore, clearly relate to the FCC's most recent iteration of the impairment analysis required to obtain the relief sought by the Petitioners.⁴

² BellSouth is not waiving its argument, reference in both its Motion to Dismiss and its Reply to Opposition to BellSouth's Motion to Dismiss, that the Authority is prohibited from reinstating a UNE that the FCC has excluded from the national list of UNEs.

³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3690 (1999) ("*UNE Remand Order*").

⁴ BellSouth acknowledges that the D.C. Circuit Court of Appeals recently remanded the *UNE Remand Order* to the FCC after rejecting the impairment analysis the FCC adopted in that Order. Accordingly, the most prudent course would be to hold this docket in abeyance until the

The Petitioners object to several of BellSouth's requests on grounds that the responsive information nature of the material sought is proprietary in nature. The Petitioners have, however, agreed to a protective order in this case, which addresses the protection of confidential and proprietary information. Proprietary information is routinely reported to the TRA and produced in discovery in TRA dockets under such protective orders. Moreover, none of the Petitioners alleged that the protective order proposed for this case was insufficient. Accordingly, that objection is without merit.

Of BellSouth's 12 discovery requests, the Petitioners have refused to provide any information in response to ten of BellSouth's requests, have offered to provide information on an aggregate basis as to one of the data requests, and have stated their intent to provide testimony, but no discovery, relating to one of BellSouth's requests. Given that this docket was initiated by the Petitioners, and that the Hearing Officer has already ruled that the Petitioners must meet the requirements of Section 251(d)(3) and the Third Report and Order in order to obtain the relief sought (Initial Order, dated April 9, 2002 at p. 9), the Coalition's position that it need not provide information in discovery is perplexing.

If the Petitioners are unwilling to respond to discovery on the factual basis on which their contentions rest, then they should not be permitted to proceed in this docket. As the parties requesting the Authority to create a UNE in this proceeding, the Petitioners bear the burden of making the requisite impairment showing, and the Petitioners are required to respond to BellSouth's discovery that addresses their ability to do so. Petitioners' blatant refusal to provide discovery in this case should preclude their proceeding in this docket. *See* Tenn. Rule Civ. Pro.

impairment standard that is to govern these proceedings is ultimately decided in accordance with the D.C. Circuit's opinion.

37.02(c). At the very least, Petitioners should not be permitted to present evidence regarding which they have failed to provide discovery. *See, for example*, Tenn. Rule Civ. Pro. 37.02(B), which permits a trial court to preclude presentation of evidence on matters as to which discovery was not provided.

Specific Responses to Objections

BellSouth Data Request No. 1.⁵ Please identify each switch that you own or operate to provide telecommunications service in the State of Tennessee, including, but not limited to, switches outside Tennessee. In answering this request, please describe with particularity for each such switch:

- (a) the specific location of the switch;
- (b) the type of switch that has been deployed (e.g., circuit, wireless, packet, etc.);
- (c) the functions and capabilities of the switch;
- (d) the geographic area served by the switch;
- (e) the total number of access lines or equivalent lines the switch is capable of serving; and
- (f) the total number of access lines or equivalent lines the switch is currently serving.

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Without limiting the preceding objections, in particular, Respondents object to the request as overly broad and not relevant to the extent it seeks information regarding switch deployment outside of Tennessee. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information.

⁵ BellSouth addresses the objections in the same order presented by the Petitioners in their joint Objection.

BellSouth's Response to Objection. As discussed above, the objection sets forth no specific basis on which Petitioners are unable to understand the request or to support the contention that the request is overly broad or unduly burdensome. Accordingly, this rotely repeated objection should be disregarded. With respect to relevance, this docket addresses the availability of local switching and the impact of local switching on the Petitioners. Clearly, facts regarding the availability of switching, through CLEC-owned switches serving in Tennessee, are relevant to this contention. To the extent that Petitioners object regarding switch deployment outside of Tennessee, the data request is limited by its text to switches that are owned or operated "to provide telecommunications service in the State of Tennessee." Accordingly, the switches outside Tennessee about which BellSouth has inquired in the data requests are relevant to the availability of local switching in Tennessee. As discussed above, the proprietary confidential or trade secret nature of the responsive information is addressed by the protective order.

BellSouth Data Request No. 2. For each switch identified in the foregoing discovery request, please provide a detailed breakdown of the costs incurred in deploying that switch as well as a complete description of those costs.

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information. In an effort to be responsive, Respondents will provide an aggregate, per switch figure.

BellSouth's Response to Objection. As stated above, Petitioners present no specific explanation of why they believe the request to be vague, overly broad, or unduly burdensome. Accordingly, this rotely repeated objection should be disregarded. As to relevance, Petitioners have contended in this docket that cost issues regarding local switching impact their ability to compete in Tennessee. The data request inquires about the costs associated with deploying

CLEC switches and is accordingly relevant to the very contentions raised by Petitioners in this docket. As noted above, Petitioners' objection regarding confidential or proprietary nature of information is addressed by the protective order in place in this docket.

With respect to this one data request, Petitioners have offered to provide aggregate information rather than CLEC-specific information. Such aggregate information is insufficient, however, because it will obfuscate the extent to which one or more of the several Petitioners may obtained switches more recently, more efficiently, or less expensively than other Petitioners.

BellSouth Data Request No. 3. Please state the total number of switching points of interface you have deployed in the State of Tennessee for the collection of traffic and identify the location of each such switching point of interface.

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information.

BellSouth's Response to Objection. The objection raised to BellSouth's Data Request No. 3 is nothing more than the same boilerplate objection applied to every data request. Accordingly, this rotely repeated objection should be disregarded. Without any specific explanation to support this objection, the objection is not well taken. With respect to relevance, again the data request seeks information regarding the manner in which Petitioners in this docket have arranged for switching of traffic. It is, accordingly, relevant to Petitioners' central contention in this docket regarding the need for unbundled local switching.

BellSouth Data Request No. 4. Please state the total number of residential access lines or equivalent lines for which you currently provide local exchange service in Tennessee. In answering this discovery request, please state:

(a) the number of residential access lines or equivalent lines that you currently serve in Tennessee that are located: (i) in the "density zone 1" central offices in the Nashville Metropolitan Statistical Area ("MSA"); and (ii) in the Nashville MSA; and (iii) outside the Nashville MSA;

(b) the number of residential access lines or equivalent lines that you currently serve in Tennessee using: (i) UNE-P purchased from BellSouth; (ii) resold telecommunications services from BellSouth; (iii) your own facilities; and (iv) your own facilities in conjunction with facilities purchased from BellSouth or a carrier other than BellSouth; and

(c) the number of residential access lines or equivalent lines that you currently serve in the "density zone 1" central offices in the Nashville MSA using: (i) UNE-P purchased from BellSouth; (ii) resold telecommunications services from BellSouth; (iii) your own facilities; and (iv) your own facilities in conjunction with facilities purchased from BellSouth or a carrier other than BellSouth.

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information.

BellSouth's Response to Objection. Again, with respect to this objection, Petitioners have repeated the same boilerplate objection without any specific explanation for the basis of that objection. Accordingly, this rotely repeated objection should be disregarded. The request focuses on the impact upon the Petitioners' ability to provide service to customers using UNE-P purchased from BellSouth, as compared with other methods. Accordingly, it bears on the central contentions in this docket. Moreover, these requests expressly address residential lines, which are part of the "mass market" that the Petitioners stress in their Petition. *See* Petition at pp. 6-7.

Again, with respect to CLEC-specific information, the protective order in place in this docket addresses those issues.

BellSouth Data Request No. 5. Please state the total number of business access lines or equivalent lines for which you currently provide local exchange service in Tennessee. In answering this discovery request, please state:

(a) the number of business lines or equivalent lines that you currently serve in Tennessee that are located: (i) in the "density zone 1" central offices in the Nashville Metropolitan Statistical Area ("MSA"); and (ii) in the Nashville MSA; and (iii) outside the Nashville MSA;

(b) the number of business access lines or equivalent lines that you currently serve in Tennessee using: (i) UNE-P purchased from BellSouth; (ii) resold telecommunications services from BellSouth; (iii) your own facilities; and (iv) your own facilities in conjunction with facilities purchased from BellSouth or a carrier other than BellSouth; and

(c) the number of business access lines or equivalent lines that you currently serve in the "density zone 1" central offices in the Nashville MSA using: (i) UNE-P purchased from BellSouth; (ii) resold telecommunications services from BellSouth; (iii) your own facilities; and (iv) your own facilities in conjunction with facilities purchased from BellSouth or a carrier other than BellSouth.

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information.

BellSouth's Response to Objection. Again, with respect to this objection, Petitioners have repeated the same boilerplate objection without any specific explanation for the basis of that objection. Accordingly, this rotely repeated objection should be disregarded. The request

focuses on the impact upon the Petitioners' ability to provide service to customers using UNE-P purchased from BellSouth, as compared with other methods. Accordingly, it bears on the central contentions in this docket. Again, with respect to CLEC-specific information, the protective order in place in this docket addresses those issues.

BellSouth Data Request No. 6. Do you currently provide local exchange service to end-user customers in Tennessee with four or more voice grade (DSO) equivalents or lines? If the answer to this discovery request is in the affirmative, please state:

(a) the total number of end-user customers with four or more voice grade (DSO) equivalent or lines currently served by you;

(b) the total number of end-user customers with four or more voice grade (DSO) equivalents or lines currently served by you that are located: (i) in the "density zone 1" central offices in the Nashville Metropolitan Statistical Area ("MSA"); and (ii) in the Nashville MSA; and (iii) outside the Nashville MSA; and

(c) the total number of end-users customer with four or more voice grade (DSO) equivalents or lines currently served by you using: (i) facilities purchased exclusively from BellSouth; (ii) resold telecommunications services from BellSouth; (iii) your own facilities; and (iv) your own facilities in conjunction with facilities purchased from BellSouth or a carrier other than BellSouth.

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information.

BellSouth's Response to Objection. Again, with respect to this objection, Petitioners have repeated the same boilerplate objection without any specific explanation for the basis of that objection. The request focuses on the impact upon the Petitioners' ability to provide service

to customers using UNE-P purchased from BellSouth, as compared with other methods. Accordingly, it bears on the central contentions in this docket. Again, with respect to CLEC-specific information, the protective order in place in this docket addresses those issues.

BellSouth Data Request No. 7. Is it your contention that the Unbundled Local Switching Exemption has prevented you from competing or otherwise made it more difficult for you to compete in the local exchange market in Tennessee? If the answer is in the affirmative, please state all facts and identify all documents that support this contention.

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information. Notwithstanding Respondents' objections, relevant information that supports the Coalition's Petition can and will be filed with the TRA as part of the Coalition's testimony.

BellSouth's Response to Objection. Petitioners repeat the same boilerplate objection with respect to this data request that have been raised with respect to each of the others without any specific explanation to support this objection. Accordingly, this rotely repeated objection should be disregarded. As to relevance, a central contention in this docket, as well as the subject of motions in the docket to date, has been whether the TRA can or should depart from the FCC unbundled local switching exemption. Accordingly, the contention that this data request is irrelevant is outrageous. As to the statement that Petitioners intend to provide information in pre-filed testimony and rebuttal, this is not sufficient to respond to discovery. Obviously, testimony and rebuttal include only the statements or information selected by the party to advocate for its position. Discovery, in contrast, is intended as a factfinding process to aid the opposing party, and the Authority, in evaluating the credibility and persuasiveness of the testimony presented. It is improper to respond to a discovery request on the basis that one

intends to address the topic in testimony. In fact, as discussed above, under the rules of Tennessee Civil Procedure, the failure to provide discovery on a topic may preclude a party from presenting any testimony on that subject.

BellSouth Data Request No. 8. Have you purchased switching from a telecommunications carrier other than BellSouth in providing local exchange service to end-user customers?

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information.

BellSouth's Response to Objection. Again, Petitioners include the same boilerplate objection on the basis of vagueness, overbreadth, burden and relevance, with no specific explanation to support that objection. Accordingly, this rotely repeated objection should be disregarded. As to relevance, Petitioners have raised contentions regarding the impact on their business of purchasing local switching in the manner currently available. BellSouth's data request bears upon the actual cost of switching. It also bears on the ability of CLECs to obtain local switching from a third-party supplier which, as explained above, is one factor to be considered in performing the requisite impairment analysis. Again, with respect to the confidential or proprietary nature of responsive information, the protective order in place in this docket addresses those issues.

BellSouth Data Request No. 9. If the answer to Discovery Request No. 8 is in the affirmative, state all facts and identify all documents referring or relating to such purchase.

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information.

BellSouth's Response to Objection. Again, the failure to provide any specific information with respect to the manner in which Petitioners believe this request to be vague, overly broad, or unduly burdensome, demonstrate that this objection is mere boilerplate and not meaningful. Accordingly, this rotely repeated objection should be disregarded. As to relevance, information regarding Petitioners' attempts to obtain switching in this market are relevant to their contentions regarding the impact of pricing of switching on their business. With respect to the confidential nature of such information, there is a protective order in place to address those issues.

BellSouth Data Request No. 10. If the answer to Discovery Request No. 8 is in the negative, please:

(a) state whether you have ever investigated or otherwise considered purchasing switching from a carrier other than BellSouth, and if so, the results of such investigation or consideration;

(b) state whether you have ever requested from a carrier other than BellSouth, and, if so, the reasons for such request and the reasons why you decided not to purchase switching from such carrier; and

(c) identify all documents referring or relating to such investigation, consideration or request.

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Without limiting the preceding objections, in particular, Respondents object to this request as overly broad and not relevant to the extent the request asks for information about operations outside the BellSouth region. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information.

BellSouth's Response to Objection. Again, the failure to provide any specific information with respect to the manner in which Petitioners believe this request to be vague, overly broad, or unduly burdensome, demonstrate that this objection is mere boilerplate and not meaningful. Accordingly, this rotely repeated objection should be disregarded. As to relevance, information regarding Petitioners' attempts to obtain switching in this market are relevant to their contentions regarding the impact of pricing of switching on their business. It also bears on the ability of CLECs to obtain local switching from a third-party supplier which, as explained above, is one factor to be considered in performing the requisite impairment analysis. With respect to the confidential nature of such information, there is a protective order in place to address those issues.

BellSouth Data Request No. 11. Please identify carriers other than BellSouth, of which you aware, that offer switching in Tennessee.

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information.

BellSouth's Response to Objection. These objections, again, are mere redundant boilerplate objections with no specific explanation. Accordingly, this rotely repeated objection should be disregarded. The data sought is clearly relevant to the availability of local switching in this market, and that issue is relevant to the central contentions raised in this docket by Petitioners about the cost of obtaining local switching and the impact on their business. The information sought also bears on the ability of CLECs to obtain local switching from a third-party supplier which, as explained above, is one factor to be considered in performing the requisite impairment analysis.

BellSouth Data Request No. 12. Is it your contention that your ability to provide local exchange service to customers in Tennessee via your own switch has been impeded by a lack of collocation space in BellSouth central offices? If the answer is in the affirmative, please state all facts and identify all documents that support this contention.

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information. Respondents do object to this question because the requested information is in the possession of BST and can be found in BST's space management reports which BST is required by Federal Communications Commission rules to produce and maintain in its possession.

BellSouth's Response to Objection. Again, the objection is largely a repetitive statement of the same boilerplate objections raised throughout with no specific explanation. Accordingly, this rotely repeated objection should be disregarded. Petitioners' objection on the grounds that the requested information is in the possession of BellSouth is not well taken. BellSouth does not know whether Petitioners "contend" that they are affected by a lack of collocation space in BellSouth's central offices. The data request is designed to determine the breadth of the contentions in this docket and to appropriately narrow the issues. There is nothing vague or unduly burdensome about seeking a statement from the complaining party of whether an issue is part of its complaint or not.

BellSouth Data Request No. 13. Please produce any and all documents referred to or identified in response to BellSouth's Discovery Requests.

Objection: Respondents object to this request as vague, overly broad, unduly burdensome, and not relevant. Respondents also object to this request to the extent it seeks trade secrets or other confidential or proprietary information.

BellSouth's Response to Objection. Again, the objection is largely a repetitive statement of the same boilerplate objections raised throughout with no specific explanation. As noted above, BellSouth does not know whether Petitioners "contend" that they are affected by a lack of collocation space in BellSouth's central offices. The data request is designed to determine the breadth of the contentions in this docket, and to appropriately narrow the issues. If Petitioners do make such a contention, then BellSouth is entitled to discovery regarding the basis for that contention.

CONCLUSION

For all the reasons stated above, BellSouth respectfully requests that the Hearing Officer enter an order requiring the Petitioners to respond in full to BellSouth's data requests, or, in the alternative, dismissing the Petition or, at the very least, prohibiting the Petitioners from presenting any evidence relating to any information sought by BellSouth's discovery requests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2002, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

☐ Hand
☐ Mail
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